86-200

No.

Supreme Court, U.S.
FILED
AUG 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

October Term, 1986

ELIOT COHEN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WASHOR, GREENBERG & WASHOR
Attorneys for Petitioner
291 Broadway
New York, New York
(212) 732-2077

MICHAEL S. WASHOR
HARVEY L. GREENBERG
On the Petition

Dick Bailey Printers, 203 Port Richmond Avenue ■ Staten Island, New York 10302
Tel.: (212) 608-7666 — (718) 447-5358 — (516) 222-2470 — (914) 682-0848

QUESTIONS PRESENTED

1. Whether or not petitioner was denied a fair trial and whether or not his rights under the 4th and 5th Amendments to the United States Constitution were violated where:

(a) The warrant to search his apartment was invalid as without probable cause for reason that the information imparted to the magistrate in support of the application for the warrant was stale and material facts were omitted, thereby creating no basis for the officers' reasonable reliance on the application's validity.

(b) The trial Court denied a pre-trial suppression hearing.

(c) The evidence seized pursuant to the invalid search warrant was admitted against him at trial.

2. Whether or not the alleged co-conspirators records and other documents were properly admitted under the co-conspirators exception to the hearsay rule under the Federal Rules of Evidence?

3. Whether or not the alleged co-conspirators records and other documents were properly admitted under the business records exception to the hearsay rule under the Federal Rules of Evidence?

4. Whether or not the conviction should be reversed and the indictment dismissed as to petitioner for reason of the government's failure to link him to or to prove his participation in the alleged conspiracy with admissible evidence?

5. Whether or not Petitioner's rights to confrontation, under the Sixth Amendment to the United States Constitution, were abridged by the admission into evidence of records and documents of alleged co-conspirators where declarants did not testify?

PARTIES

The appellants in the United States Court of Appeals for the Second Circuit and the defendants in the United States District Court for the Southern District of New York were Eliot Cohen, Johnanne Winchester and Harold Barr.

TABLE OF CONTENTS

Pages

Questions Presented i

Parties ii

Table of Authorities v

Petition for Writ 1

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions 2

Preliminary Statement 3

Statement of Facts 5

Application for the Search Warrant Issued October 7, 1984 6

The Case Against Petitioner 7

Petitioner's Defense 8

Reasons for Granting the Writ 9

POINT I—This Court Should Grant Certiorari As This Case Presents Important Constitutional Issues Concerning (1) The Determination Of Probable Cause Sufficient To Support The Issuance Of A Search Warrant, (2) The Extent To Which The Good Faith Exception Established By This Court In *U.S. v. Leon* Insulates An Invalid Warrant From Attack And Relieves The Federal Courts From The Obligation To Make Probable Cause Determinations, And (3) The Procedures Under Which The Aforementioned Determinations Should Be Made 9

POINT II—This Court Should Grant Certiorari As This Case Presents Important Issues Concerning The Admission Of Hearsay Records And Documents Of Alleged Co-Conspirators, The Right To Confrontation Under The Sixth Amendment To The United States Constitution And The Co-Conspirator And Business Record Exceptions To The Hearsay Rule, Under The Federal Rules Of Evidence 17

Conclusion 22

Appendix A—Trial Court Decision 12/20/84 .....1a

Appendix B—Trial Court Decision 1/4/85 .....4a

Appendix C—Transcribed Application for Search Warrant 10/7/84 .....6a

Appendix D—Docket Entry-Judgment Of Trial Court 5/10/85 .....18a

Appendix E—Decision Of The United States Court of Appeals for the Second Circuit 6/30/86 .....20a

CASES CITED

Bruton v. U.S., 391 U.S. 123 (1968).....21

Illinois v. Gates, 462 U.S. 213 (1983) 10

Rosencranz v. U.S., 356 F.2d 310 (1st Cir., 1966) 14

U.S. v. Beltempo, 675 F.2d 472 (2d Cir. 1982), *cert. denied*, 457 U.S. 1135 (1982) 12

U.S. v. Fama, 758 F.2d 834 (2d Cir. 1985) 14

U.S. v. Garcia-Duarte, 718 F.2d 42 (2d Cir. 1983) 18,19

U.S. v. Geaney, 417 F.2d 1116 (2d cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).....18

U.S. v. Leon, 468 U.S. 897 (1984).....15

U.S. v. Miller, 771 F.2d 1219 (9th Cir. 1985) 21

U.S. v. Terry, 702 F.2d 299 (2nd Cir. 1983) 17

U.S. v. Neal, 500 F.2d 305 (10th Cir. 1974) 13

In The Supreme Court of the United States

October Term, 1986

ELIOT COHEN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ELIOT COHEN petitions this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (hereinafter Circuit Court) to review the decision of that Court, which upheld petitioner's conviction for conspiracy to distribute and possess with intent to distribute cocaine in violation of 21 U.S.C. §846 and for distribution and possession of cocaine in violation of 21 U.S.C. §§812, 841(A)(C)(1), and 841(A)(1), and upheld the imposition of a sentence of incarceration for a seven and one-half year term (7½) and a fine of One Hundred Thousand Dollars.

OPINIONS BELOW

The decisions and judgment of the United States District Court (Lasker, J.), is set forth in the annexed appendix, Pages 1a-5a.

The decision of the United States Court of Appeals has not as yet been published in the official reports but is set forth in the annexed appendix, Page 20a.

JURISDICTIONAL STATEMENT

This petition seeks review of a decision of the United States Court of Appeals for the Second Circuit, rendered on June 30, 1986, which decision affirmed petitioner's conviction for violating the provisions of 21 U.S.C. §§812, 841, and 846.

This present petition was filed with this Court within 60 days of the date that the decision of the Circuit Court was rendered on June 30, 1986.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides, in pertinent part, as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by oath or affirmation ***.

2. The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No person shall be *** deprived of life, liberty or property, without Due Process of law.

3. The Sixth Amendment to the United States Constitution states, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury *** to be confronted with the witnesses against him***.

PRELIMINARY STATEMENT

Eliot Cohen was adjudged guilty after a jury trial in the United States District Court for the Southern District of New York (Lasker, J.) of conspiracy to distribute and possession with intent to distribute cocaine in violation of the provisions of 21 U.S.C. §§812, 841(A)(1), 841(A)(C)(1), and 846. As a result of the aforementioned conviction petitioner was sentenced to a term of incarceration of seven and one half (7½) years and an aggregate fine of $100,000 dollars. The United States Court of Appeals for the Second Circuit affirmed.

This petition asks this Court to review the Circuit Court's decision. Petitioner contends that evidence improperly admitted against him denied him a fair trial and that this case presents unresolved issues of law as relates to the admissibility of hearsay evidence in criminal conspiracy cases, under the Federal Rules of Evidence, the rights to confrontation under the Sixth Amendment, and the extent to which evidence seized pursuant to a warrant, unsupported by probable cause, is admissible under the "good faith" exception established by this Court in *U.S. v. Leon,* 468 U.S. 897 (1984), and the scope of said exception.

Petitioner timely moved in the District Court to suppress the evidence seized pursuant to the search warrant. Suppression was denied by the District Court without a

hearing. The Court found, *inter alia,* that even if probable cause was lacking, the magistrate was not shown to have abandoned his judicial role and the warrant was insulated from attack under the good faith exception established by this Court in *U.S. v. Leon.* (512, 513)* Petitioner timely objected in the District Court to the admission of the documents and papers seized from the co-defendants and alleged co-conspirators, on the grounds that said documents were inadmissible hearsay and/or did not meet the business records or co-conspirator exception to the hearsay rule. The District Court overruled the objection.

On appeal to the Circuit Court petitioner renewed his objection to the admission of the evidence seized pursuant to the search warrant and to the admission of the alleged co-conspirators records and documents. The points urged in petitioner's brief included the contentions that:

POINT I—THE RECORDS AND DOCUMENTS OF THE CO-CONSPIRATORS WERE IMPROPERLY ADMITTED INTO EVIDENCE AGAINST THE APPELLANT COHEN.

POINT II—THE SEARCH WARRANT WAS INVALID: THERE WAS NO PROBABLE CAUSE AND THE INFORMATION WAS STALE; THE MAGISTRATE WAS "BAITED" INTO RUBBER STAMPING THE AUTHORITY TO SEARCH BY MISLEADING AND OMITTED INFORMATION; THE TRIAL COURT ERRED IN ALSO DENYING APPELLANT'S REQUESTED PRE-TRIAL HEARING.

The decision of the Circuit Court, dated June 30, 1986, of which review is sought, rejected petitioner's contentions and affirmed his conviction.

---

*Page references refer to Petitioner's appendix before the Circuit Court.

STATEMENT OF FACTS

ELIOT COHEN (hereinafter petitioner), a music publisher, resided in a multi-family apartment house located at 421 Hudson Street, Apartment 712, in New York City (hereinafter "apartment"). On October 7, 1984, he was arrested in the apartment, which had been his home for several years. Only a book, purporting to be an address book, was seized in the apartment by the government at the time of his arrest. However, that same evening, pursuant to a warrant obtained upon oral application to a United States Magistrate, the apartment was searched and additional tangible evidence was seized, which included a small weighing device, an empty pistol, some plastic bags containing small traces of cocaine residue, paper writings, diaries, and a torn paper segment of what purported to be a paper writing, documents containing numbers giving the appearance of records, a sum of cash approximatley $16,000.00 dollars and a tape recording of telephone messages.

The government's main case centered around evidence obtained from one HAROLD BARR (hereinafter BARR), an indicted co-conspirator who was convicted after trial as the key figure of a cocaine distribution network and BEVERLY GRIGOLEIT (hereinafter GRIGOLEIT), who was a fugitive and who was not available at the time of trial.

Based upon the aforementioned evidence, petitioner was alleged by the Government to have purchased cocaine from the BARR organization, as a wholesale customer, on December 2, 1981, December 15, 1981, December 17, 1981, December 27, 1981, December 30, 1981, January 2, 1982, January 12, 1982 and January 25, 1982. These allegations formed the basis of the conspiracy charges and

substantive charges of distribution and possession with intent to distribute cocaine.

THE APPLICATION FOR AND ISSUANCE OF THE SEARCH WARRANT ON OCTOBER 7, 1984

On *October 7, 1984,* some hours subsequent to petitioner's arrest, pursuant to an arrest warrant issued on *September 18 1984,* and some *eight (8) months after* the government recovered diaries from co-defendant GRIGOLEIT purportedly linking petitioner to other alleged co-conspirators, the Government applied orally to a United States Magistrate for the issuance of a search warrant to search the apartment. A tape recording of the oral application was transcribed and is set forth in the annexed Appendix at Page 6a.

The application for the search warrant was based upon DEA Special Agent MICHAEL LEVINE'S (hereinafter LEVINE) claimed knowledge of petitioner's involvement in drug activities from 1981 through late 1983 and early 1984, and petitioner's claimed affiliation with BARR and GRIGOLEIT, during that time period. LEVINE also claimed that based upon his long term experience as a narcotic investigator, drug dealers generally maintain narcotics and financial records and documents related to their narcotics activities.

The magistrate was not advised that N.Y.P.D. Detective ROCCO SANFILIPPO (hereinafter SANFILIPPO) visited the building where the apartment was located, learned from the doorman that a 24 hour sign-in, sign out log was maintained for visitors to each apartment (190a) and that an examination of the book did not reveal the names of BARR, FREEMAN (an alias of BARR), GRIGOLEIT, NEWMAN, HEITMAN, or the names of

any other co-conspirators (199a, 200a) nor was the magistrate advised that no one, including the *petitioner,* had come to or left the subject apartment for a three week period prior to the date the warrant was applied for (196a, 197a).

Petitioner's motion for a pre-trial evidentiary hearing and suppression of the evidence was denied below.

THE CASE AGAINST THE PETITIONER

The Government's case against petitioner relied primarily upon the records and documents of alleged co-conspirators and the fruits of a search of petitioner's apartment.

On *January 27, 1984,* more than eight months prior to the time that petitioner was arrested on October 7, 1984, a telephone book was seized that belonged to GRIGOLEIT, a named and indicted co-defendant and alleged co-conspirator. The telephone book contained two telephone numbers with a reference denominated "ELI", but lacked the petitioner's name anywhere within its contents. One of the telephone numbers contained in the book was purported to be assigned by the telephone company to the petitioner.

Additionally, certain notebooks belonging to co-defendant BARR were alleged to contain records of drug transactions which referred to "ELI", but did not make specific reference to petitioner.

Furthermore, a torn segment of a writing found with co-defendant BARR's personal property was alleged to fit a torn segment of a writing interspersed with the petitioner's personal property. When pieced together, the writings on the two pieces of paper purportedly joined letters which formulated the words *EL, Beverly called* and

other letters and numbers. No reference contained on the papers indicated the name Eliot Cohen. No handwriting experts linked the handwriting to petitioner or to any other of the alleged co-defendants.

Lastly, the name Robert Kalina was listed in petitioner's telephone diary and in the diary seized by the government from BARR.

There was no connection or comparison made by witnesses for the government, which linked the records seized from petitioner's premises and the other records of the alleged co-conspirators. *None of the Government's witnesses testified that petitioner was a member of the conspiracy or that he purchased, possessed or distributed cocaine, as charged.* There was no showing that petitioner had ever been seen with, acted with or spoke with any of the other alleged co-conspirators (223a). There was no showing that petitioner had ever been seen with, acted with or spoke with any of the other alleged co-conspirators (223a). There was a showing that Robert Kalina, Esq. was an attorney at law who had represented petitioner in a legitimate business enterprise.

PETITIONER'S DEFENSE

Petitioner introduced evidence below which sought to establish his attorney client relationship with Robert Kalina, Esq., in matters relating to music publishing. Petitioner introduced, *inter alia,* a music album which he had produced with Kalina's representation and which supported that relationship.

REASONS FOR GRANTING REVIEW

I. THIS COURT SHOULD GRANT CERTIORARI AS THIS CASE PRESENTS IMPORTANT CONSTITUTIONAL ISSUES CONCERNING (1) THE DETERMINATION OF PROBABLE CAUSE SUFFICIENT TO SUPPORT THE ISSUANCE OF A SEARCH WARRANT, (2) THE EXTENT TO WHICH THE GOOD FAITH EXCEPTION ESTABLISHED BY THIS COURT IN *U.S. V. LEON* INSULATES AN INVALID WARRANT FROM ATTACK AND RELIEVES THE FEDERAL COURTS FROM THE OBLIGATION TO MAKE PROBABLE CAUSE DETERMINATIONS, AND (3) THE PROCEDURES UNDER WHICH THE AFOREMENTIONED DETERMINATIONS SHOULD BE MADE.

In the instant case the District Court denied petitioner's motion for an evidentiary hearing and for suppression, holding that the Magistrate was not shown to have abandoned his judicial role, that the officers' reliance on the validity of the warrant was reasonable, and that the warrant was supported by probable cause (512, 513).

Petitioner contends that the warrant was *unsupported by probable cause as the information* imparted to the magistrate was *much too old to* furnish probable cause. The facts alleged in the application did not furnish probable cause to believe, at the time that the search was actually conducted, that evidence of criminal activity could be found at the specific location to be searched. Additionally, petitioner contends that the officer's failure to impart material information to the magistrate, which was highly relevant to his consideration of whether probable cause existed, and the remoteness of the information im-

parted, invalidated the warrant. The officers, acting in such a vacuum of information, could not objectively or reasonably rely upon the warrant's validity.

Under the totality of the circumstances herein, no probable cause existed to believe that records and documents pertaining to the charges for which petitioner had been arrested would be found upon a search of the apartment on October 7, 1984. The facts of this case are clearly distinguishable from the facts in *Illinois v. Gates,* 462 U.S. 213 (1983), where, while the individual informant was of untested veracity and reliability, the information imparted *was current* and *detailed an ongoing operation* being conducted from the defendant's premises and the details of *current and ongoing criminal activites were corroborated* by information provided by federal agents. By contrast, in the instant case the application for a warrant was based upon LEVINE's claimed knowledge of petitioner's alleged drug activities during a remote *prior period of time.* Additionally, it was based upon LEVINE's conclusory statement that *drug dealers tend to keep records and documents* of their transactions. The application for the warrant was not based upon specific knowledge as to the petitioner's conduct and/or to specific knowledge of the location sought to be searched and does not rise to the level of current and detailed information supportive of ongoing criminal activity, as in *Gates.* As this Court observed in *Illinois v. Gates,* 462 U.S. 213:

> Our earlier decisions illustrate the limits beyond which a magistrate may not venture in issuing a warrant. A sworn statement of affiant that he has cause to suspect and does believe that liquor illegally brought into the United States is located on certain premises will not do. *Nathanson v. United States,* 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159

(1933). An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and the wholly conclusory statement at issue in *Nathanson* failed to meet this requirement. An officer's statement that "affiants have received reliable information from a credible person and do believe that heroin is stored in a home, is likewise inadequate. *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). As in *Nathanson,* this is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. Sufficient information must be presented to magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued.***"

Id. at 239.

While it is not petitioner's contention that the affidavit in the instant case was totally conclusory in nature, petitioner submits that under the "totality of the circumstances" test there was no probable cause on *October 7, 1984,* to search the apartment. On the date that the search warrant was executed there was no probable cause to believe that records and documents pertaining to drug transactions allegedly consummated by petitioner in *December 1981 and January, 1982* would be found upon the execution of said warrant, some three years later.

The warrant to search the apartment was alleged to be based upon LEVINE's interpretation of purported coded entries contained in books recovered as the result of arrests made on *January 27, 1984* and seizures made in *September, 1984.* These purported records contained references to a person named "ELI" and no references to Eliot Cohen. The *latest entry* attributed to petitioner dated *November 10, 1983,* stated: "ELI $65,000." As a result of

the arrests of co-defendants made on *January 28, 1984,* telephone diaries, designating *the name ELI* and the purported phone number 691-7672, were seized. The affidavit stated that the phone number found in the seized telephone book was *in the name of petitioner* and that he was the only person known to be living in the apartment. Furthermore, the affidavit stated that *petitioner received frequent visitors late at night and early in the morning,* who remained at the premises from 20 minutes to 1½ hours.

On the basis of the foregoing claims, the Magistrate issued a warrant to search the apartment, on October 7, 1984, at which time the government seized certain tangible evidence, as detailed above.

It is petitioner's contention that the application for the search warrant was not supported by probable cause as 1) the information provided to the issuing magistrate was too remote, 2) the officer's possessed material facts and relevant information bearing on the issue of probable cause and failed to impart said information to the magistrate and that the fruits of the resulting illegal search should have been excluded under the exclusionary rule of the Fourth Amendment as an objectively reasonable officer would not have relied upon the validity of a warrant so lacking in probable cause.

The Fourth Amendment to the United States Constitution prohibits the issuance of search warrants unsupported by probable cause. As the Court in *U.S. v. Beltempo,* 675 F.2d 472 (2d Cir. 1982), cert. denied, 457 U.S. 1135 (1970), observed:

> A neutral magistrate must be satisfied that there is "probable cause" to believe that grounds for the applica-

> tion exist before he issues a warrant. Fed. R. Crim. P. 41 (c). Probable cause to issue a warrant looks first to the adequacy and reliability of the observation. Specificity assured, currency is considered. *To justify a present search probable cause must be current and not rest on facts which existed in the past, unless there is reason to believe those facts are still in existence.* 3C Wright, Federal Practice and Procedure §662 at 23 (1969). The general principles governing the delay between the known existence of facts and the issuance of a warrant were set forth by Chief Justice Hughes in *Sgro v. United States,* 287 U.S. 206, 53 S.Ct. 138, 77. L.Ed. 260 (1932) "While the statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, *it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.* Whether the proof meets this test must be determined by the circumstances of each case." (Id. at 210, 211, 53 S.Ct. at 140).

Id. at 477. (Emphasis added)

In *U.S. v. Neal,* 500 F.2d 305 (10th Cir. 1977) the Court observed:

> *** A more difficult question arises as to the sufficiency of the showing to the magistrate to support a finding that there was probable cause to believe that a crime was being committed on the premises to be searched at the time of the filing of the Affidavits. We are convinced that the remoteness of the information relied upon is such that it will not support the issuance of a valid warrant. The Fourth Amendment contemplates that probable cause for the issuance of a search warrant must exist at the time the search is sought to be made. Probable cause existing at some time in the past will not suffice unless circumstances exist from which it may be inferred that the grounds continued to the time the affidavit was filed.

Id. at 309

In the instant case no circumstances existed from which it could reasonably be inferred that records of drug transactions allegedly consummated in late 1981 and early 1982 would be found at the premises searched pursuant to a warrant issued on October 7, 1984, almost three years later. Therefore, the information of petitioner's alleged prior drug related activities and LEVINE's conclusory statement that drug dealers generally maintain drug records does not show continuity to the time the affidavit was filed or that there was probable cause to believe that a crime was being committed on the premises. Accordingly, the issuance of the search warrant was unjustified. See also, *Rosencranz v. U.S.*, 356 F.2d 310, 317 (1st Cir. 1966).

The instant case is clearly distinguishable from the facts in *U.S. v. Fama,* 758 F.2d 834 (2d Cir. 1985) where the warrant to search for evidence of illegal activities was based upon *observation of the defendant at the time and place where a phone call* intercepted by the government *indicated a major drug transaction was being consummated.* The Court held that a five week delay from the consummation of the transaction until the issuance of the warrant was not unreasonable. In the instant case, the latest information linking the petitioner in anyway to any of the co-defendnats was a coded entry in an alleged record making reference *to ELI* and to the date *November, 1983,* approximately *11 months prior to the issuance of the search warrant* and substantially more remote than the time period which was found reasonable in *Fama.* In *Fama,* the Second Circuit, in an appeal by the government after a finding below that probable cause was lacking and that the officers lacked reasonable reliance in the validity of the warrant, declined to address the issue of probable cause independent from the issue of good faith, determining as the law of this Circuit that even where there is a close probable cause question, the Court is not required to reach

that issue, being compelled by the holding in *U.S. v. Leon,* 468 U.S. 897, to *uphold the search where good faith is present, irrespective of whether probable cause was lacking.*

Petitioner contends that the determination of *the issue of probable cause and the issue of the good faith exception to the exclusionary rule are separate and distinct* and that this Court's holding in *U.S. v. Leon* does not relieve federal courts of their obligation to make a determination in the first instance *as to whether probable cause existed.* If probable cause is found then the Court's inquiry will be terminated; if probable cause is lacking then the Court should inquire further as to whether the search can be upheld, while preserving the deterrent rationale of the exclusionary rule.

Respecting the issue of good faith under *U.S. v. Leon,* petitioner submits that the good faith exception is inapplicable under the facts of this case as the application for a warrant contained numerous and substantial inculpatory omissions which can only be considered deliberate and not labeled as inadvertent and innocent and these omissions, when coupled with the staleness of the information provided, establish that an objectively reasonable officer would not have relied upon the warrant's validity. Detective SANFILIPPO, the agent assigned to the case, relayed information to LEVINE which formed the basis for the application for the warrant. SANFILIPPO knew that petitioner's name was not recorded in any diary seized from any alleged co-conspirator (215a); he knew that *no aliases or fictitious names were used by petitioner* (221a) and that petitioner had never been seen with any of the alleged co-conspirators (223a). Additionally, SANFILIPPO and/or LEVINE failed to advise the magistrate that the apartment had been unoccupied for at least three weeks prior to the time that the application was

made and that careful inspection of a 24 hour per day visitor log maintained by a doorman at the subject building failed to indicate the names of any of the alleged co-conspirators, as visitors to the apartment, either recently or otherwise. Furthermore, the magistrate was not advised that SANFILIPPO found two telephone numbers in the records seized from co-defendants which made reference to ELI yet he did not verify both phone numbers but only verified the one purportedly assigned to petitioner by the telephone company (210a, 211a). Under the circumstances presented to the federal magistrate on October 7, 1984, petitioner submits that the officers involved could not have reasonably relied upon the applications validity. The fruits of the search pursuant to a warrant, lacking in probable cause, should have been suppressed by the Court below, in accordance with the exclusionary rule. Without the fruits of the search, the government had no case against petitioner.

Petitioner submits that this Court should grant review herein to resolve the issues of whether or not (1) the probable cause and good faith exception to an invalid warrant are separate and distinct determinations and (2) to resolve the issue of whether a defendant, such as the petitioner herein, is entitled to an evidentiary hearing on the issue of probable cause and is entitled to an opportunity to establish that the officers could not have reasonably relied upon the validity of the warrant, because of (a) the remote quality of the information presented and (b) their knowledge of the lack of petitioners or alleged co-conspirators activity, illicit or otherwise, at the apartment, prior to the issuance of the search warrant and (c) a lack of evidence linking petitioner to the alleged co-conspirators, and (d) the omission of these and the other factors cited above, relevant to the magistrate's probable cause determination.

II—THIS COURT SHOULD GRANT CERTIORARI AS THIS CASE PRESENTS IMPORTANT ISSUES CONCERNING THE ADMISSION OF HEARSAY RECORDS AND DOCUMENTS OF ALLEGED CO-CONSPIRATORS, THE RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CO-CONSPIRATOR AND BUSINESS RECORD EXCEPTIONS TO THE HEARSAY RULE, UNDER THE FEDERAL RULES OF EVIDENCE.

This case presents issues concerning the admissibility of hearsay records and documents of alleged co-conspirators under the co-conspirator and business records exceptions to the hearsay rule—Fed. R. Evid. 801(d)(2)(E) and 803(6). In the instant case purported records and documents seized from co-defendant BARR and indicted alleged co-conspirator GRIGOLEIT (who was a fugitive and was therefore unavailable at time of trial) were admitted into evidence against petitioner over timely objection. The aforementioned purported records and documents were offered to prove the truth of the matters asserted therein and to establish a link between the activities of the co-defendants, the alleged co-conspirator GRIGOLEIT, and the petitioner. The aforementioned records and documents contained hearsay statements purportedly made by BARR and GRIGOLEIT, both of whom did not testify at trial. *See also, U.S. v. Terry,* 702 F.2d 299 at 304, 320 n.22, 321 (2d Cir. 1983). The records, notebooks, papers, and diaries contained entries referring to ELI, a telephone number purportedly assigned to petitioner by the telephone company, and to purported drug transactions. Excluding from consideration the aforementioned hearsay statements, the Government had insufficient evidence with which to establish a case against petitioner.

The standard for admission of co-conspirator hearsay statements was established in the Second Circuit in the case *U.S. v. Geaney,* 417 F.2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970), where the Court held that in determining admissability of hearsay evidence under the co-conspirator exception, the *proponent is required to show* a likelihood of *illicit association* between the declarant and the defendant *by independent evidence.*

Under the *Geaney* standard, statements by persons alleged to be co-conspirators may be considered by the jury only if the trial Court is satisfied by a fair preponderance of the evidence that the defendant was in fact a member of the conspiracy. Petitioner contends that the records and documents of alleged co-conspirators were improperly admitted against him over timely objection. *The Government failed to offer* a fair preponderance of *independent* non-hearsay *evidence showing* the petitioner's *participation* in the charged conspiracy.

In *U.S. v. Garcia-Duarte,* 718 F.2d 42 (2d Cir. 1983) the Court held, *inter alia,* that the District Court erred in admitting allege co-conspirator records where the government failed to illicit independent non-hearsay evidence showing a likelihood of an illicit association between the declarant and the defendant, respecting the charged conspiracy. The records seized consisted of a telephone diary found on the body of one Echeverri, a major drug dealer and supplier. The diary contained the defendant's name and phone number. A search of the defendant's apartment revealed drugs, residue of drugs, a scale and a magazine with an address label "M. Echeverri." The Court observed:

> The telephone book found on Echeverri's body, containing *** telephone numbers traceable to Garcia-Duarte,

did not refer to narcotics dealings. The magazine found in Garcia-Duartes' home and addressed to 'M. Echeverri' *** was no more sinister. Further, the Government never *** established any specific connection between the *** cocaine discovered in Echeverri's apartment *** and the (cocaine) discovered in Garcia-Duartes' bathrobe.

. . .

Even when viewed in the light most favorable to the Government, the most this evidence showed was that both Echeverri and Garcia-Duarte were drug dealers and that they were acquainted. We have consistently held, however, that "[m]ere familiarity with a drug dealer does not make one a member of his conspiracy; nor does his association with a conspirator provide a sufficient basis for the admissibility of hearsay statements of an alleged co-conspirator" (citations omitted). In *United States v. Steinberg, supra,* there was overwhelming evidence that Steinberg participated in a large scale narcotics distribution conspiracy. There was also competent evidence that Steinberg's alleged co-conspirator, defendant Parker, engaged in narcotics transactions at Steinberg's apartment. This Court nevertheless held that although the independent evidence established that Parker and Steinberg were friends and fellow drug users, 525 F.2d at 1134, it did not provide a sufficient basis for the admission of Steinberg's hearsay statements against Parker as the statement of a co-conspirator. Id.

Similarly here, the connection between Garcia-Duarte and Echeverri was insufficient to permit the introduction against Garcia-Duarte of Echeverri's customer book as the statement of a co-conspirator. Even assuming that the book was Echeverri's, the independent non-hearsay evidence simply did not establish that Garcia-Duarte and Echeverri were participants in the same cocaine conspiracy.

Id. at 46.

In the instant case, as in *U.S. v. Garcia Duarte,* the contested records and documents were offered for the truth of the matters asserted and the government's proof

of the defendant's participation in the alleged conspiracies was not established by a fair preponderance of the evidence. In the instant case not one of the alleged co-conspirators identified the petitioner as a participant in the conspiracy. Instead, the government relied upon its witnesses' interpretation of coded entries found in books seized from BARR and GRIGOLEIT, the entries did not provide a plain meaning. The decoding and interpretation provided by the Government witness was conjectural at best. An alleged co-conspirator, one Mr. Weil, testified for the government that the notations found in GRIGOLEIT's books were inaccurate and were confusing to him. Weil admitted that he personally couldn't make head or tail of the notations, despite his knowledge of narcotics transactions (317a, 318a). The Government nevertheless relied upon the assertions made in those records to establish the overt acts in furtherance of the conspiracy and to establish the substantive charges against the petitioner. Under such circumstances, the aforementioned documents, records and writings were hearsay as to the petitioner. The government, failing to elicit a preponderance of independent evidence linking petitioner to the alleged conspiracy, was not entitled to have those records admitted as evidence against him.

Furthermore, the admission of the subject records and documents against petitioner cannot be justified under the business records exception to the hearsay rule, Fed. R. Evid. 803(6), as the government failed to establish that the records were trustworthy and accurate. Additionally, there was no proof that the writings were made contemporaneously with the alleged transactions (300a, 301a, 317a, 318a). Absent proof that the writings were prepared by a person with knowledge at the same time or close to the time of the incident recorded and that the record was kept in the course of regularly conducted

business activity, the foundational facts for the admission of a writing as a business record is not established. *E.g., U.S. v. Miller,* 771 F.2d 1219 (9th Cir. 1985). Accordingly, under the facts and circumstances as aforementioned, the contested records and documents were not admissible as business records and the Court below erred in admitting such hearsay statements over the petitioner's objections.

Petitioner contends that he was deprived of a fair trial and that his Sixth Amendment rights under the United States Constitution to the confrontation of adverse witnesses were violated by the admission of the hearsay statements of his alleged co-conspirators. The hearsay statements were offered for the truth of the matters asserted therein and a substantial risk existed that the jury relied upon such hearsay statements in reaching a determination as to petitioner's guilt. *E.g., Bruton v. U.S.,* 391 U.S. 123.

Finally, the petitioner contends that without the admission of the hearsay statements, the government had no case against him and he prays for the relief sought herein.

CONCLUSION

Upon the facts and principles of law outlined above, it is earnestly urged that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit and review the decision of that Court which affirmed petitioner's conviction, upheld the admission of documents seized at the petitioner's premises and upheld the admission of purported co-conspirators' records, which documents and records formed the basis for petitioner's conviction below.

Respectfully submitted,

WASHOR, GREENBERG & WASHOR
Attorneys for petitioner
291 Broadway
New York, NY 10007
(212) 732-2077

MICHAEL S. WASHOR,
HARVEY L. GREENBERG,
On the Petition

APPENDIX A—TRIAL COURT DECISION 12/20/84

ENDORSEMENT

UNITED STATES OF AMERICA v. ELIOT COHEN a/k/a "ELI", et al. Defendants. SSSS 84 Cr. 82 (MEL)

LASKER, D.J.

Defendant Eliot Cohen moves to suppress all evidence obtained pursuant to a warrant authorizing the search of Mr. Cohen's apartment at 421 Hudson Street, Apartment 712, on the grounds that the information contained in the oral warrant application made to Magistrate Dolinger was stale and the officer's reliance on the warrant was unreasonable.

The motion is denied.

A claim of insufficient probable cause based on stale information must be examined in light of the circumstances in each case. *Sgro v. United States,* 287 U.S. 206, 211 (1932). Where, for instance, the alleged criminal activity is of a continuing nature a greater time lapse is justified. *See United States v. Beltempo,* 675 F.2d 472, 477 (2d Cir.), *cert. denied,* 457 U.S. 1135 (1982); *United States v. Hillard,* 701 F.2d 1052 (2d Cir.), *cert. denied,* 103 S. Ct. 2431 (1983). Among the circumstances to be considered is a magistrate's finding of probable cause which, in itself, "is a substantial factor tending to uphold the validity of the warrant." *United States v. Beltempo,* 675 F.2d at 478; *see United States v. Jackstadt,* 617 F.2d 12, 13 (2d Cir. 1980) (*per curiam*), *cert. denied,* 445 U.S. 966 (1981). Moreover, even if a warrant subsequently is determined to be invalid, the exclusionary rule will not operate to suppress the evidence seized pursuant to the warrant when a magistrate has not abandoned his judicial role and the officer's reliance on the probable cause determination is ob-

jectively reasonable. *United States v. Leon,* 52 U.S.L.W. 5155 (July 5, 1984).

In the instant case, the Magistrate was presented with allegations that Cohen was involved in purchasing substantial quantities of cocaine from the end of 1981 until approximately January of 1984. The warrant sought was specifically circumscribed to allow the seizure of only non-consumable items, i.e., records of past narcotics transactions and related financial records, of the type which, based upon the agent's fourteen years of experience, are commonly kept by persons who deal in significant quantities of narcotics. Although the affidavit contained information concerning acts which took place eleven months earlier, more recent information alleging that visitors continually frequented Mr. Cohen's apartment for short periods of time late at night and early in the morning was also presented.

Magistrate Dolinger found the affidavit was sufficient to support a finding of probable cause. Although the warrant application was made orally, the Magistrate took written notes of the facts presented to him. Indeed, he himself raised the issue of staleness and he questioned the Assistant United States Attorney until he was satisfied that htere was, nonetheless, probable cause to search.

Upon a "commonsense" review of the foregoing facts, *United States v. Ventresca,* 380 U.S. 102, 108 (1965) and in accordance with the deference to which the Magistrate's findings are entitled, *United States v. Jackstadt,* 617 F.2d at 13, we conclude there was probable cause to search the Hudson-Street apartment. Although we recognize the evidence provided in the affidavit is such that it could ". . . create disagreement among thoughtful and competent judges as to the existence of probable

cause", *United States v. Leon,* 51 U.S.L.W. at 5162, it is clear that Magistrate Dolinger conscientiously performed his role as a neutral and detached judicial officer and that the officer's reliance on the Magistrate's determination of probable cause was objectively reasonable. *Id.*

The motion is denied.

It is so ordered.

Dated: New York, New York
December 20, 1984

s/ Maurice Lasker
U.S.D.J.

U.S. DISTRICT COURT
FILED
DEC. 21, 1984
S.D. OF N.Y.

APPENDIX B—TRIAL COURT DECISION 1/4/85

ENDORSEMENT

UNITED STATES OF AMERICA v. HAROLD BARR, et al., Defendants. SSSS 84 Cr. 82(MEL)

LASKER, D.J.

On December 20, 1984 we denied Eliot Cohen's motion to suppress evidence obtained pursuant to a warrant authorizing the search of Mr. Cohen's apartment. Cohen has now moved to reargue by letter of counsel dated December 21, 1984. He argues the motion should not have been denied without first holding an evidentiary hearing.

The motion is denied.

The defendant has misconstrued our prior holding. In that decision we did not place "great reliance" on the fact that "more recent information alleging that visitors continually frequented Mr. Cohen's apartment for short periods of time late at night and early in the morning was also "presented" but rather considered that merely as one factor in the determination that the Magistrate correctly found probable cause to believe that records of past narcotics transactions were in Eliot Cohen's apartment.

Nonetheless, under *United States v. Leon,* 52 U.S.L.W. 5155 (July 5, 1984), whether the Magistrate's finding of probable cause was correct is irrelevant unless the circumstances of the case bring it within one of the four exceptions enumerated by the Supreme Court. *Id.* at 5162. Suppression remains an appropriate remedy if (1) the judicial officer issuing a warrant was "misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth;" (2) the issuing magistrate "wholly

abandoned his judicial role;" (3) an affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" or (4) "a warrant is so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid."

In the instant case there is no allegation that the warrant was facially deficient. Nor do we find, as our prior decision indicates, that Magistrate Dolinger abandoned his judicial role or that the affidavit was so lacking in indicia of probable cause that official belief in its existence was unreasonable. Thus, the only exception applicable relates to whether the Magistrate was misled by information that the affiant knew or should have known was false.

Cohen's assertion that he was out of the state for approximately one month immediately prior to his arrest does not impugn the affiant's statement that "Eliot Cohen frequently receives visitors late at night and early in the morning." More important however, is the fact that a careful reading of the transcript of the oral affidavit reveals that despite the lack of a precise time frame, Magistrate Dolinger did not assume that this particular information was more recent than eleven months ago. The Magistrate clearly was not misled by any information presented to him.

Accordingly, the motion is denied.

It is so ordered.

Dated: New York, New York
January 4, 1985

MORRIS E. LASKER
U.S.D.J.

APPENDIX C—TRANSCRIBED APPLICATION FOR SEARCH WARRANT 10/7/84

THE FOLLOWING IS AN ORAL REQUEST FOR A SEARCH WARRANT, TELEPHONICALLY MADE TO U.S. MAGISTRATE MICHAEL H. DOLINGER BY ASSISTANT U.S. ATTORNEY MICHAEL BROMOWICH AND SPECIAL AGENT MICHAEL LEVINE OF THE DRUG ENFORCEMENT ADMINISTRATION ON OCTOBER 7, 1984. THE WARRANT WAS REQUESTED FOR PREMISES: 421 HUDSON STREET, NEW YORK, NEW YORK, APARTMENT 721, TENANTED BY ELIOT COHEN.

M. Levine — This is Group Supervisor Mike Levine. Todays date is October the 7th, 1984. The time is now 5 minutes to 11 P.M. Eh—present is Assistant U.S. Attorney Michael Bromowich. Case number CT 849955. We're about to make a telephone application for a search warrant for premises 421 Hudson Street, Apartment 712. Let's see—we're about to telephone eh—Ma-Magistrate Dolinger.

M. Bromowich: I have just dialed the home phone of Magistrate—U.S. Magistrate Michael H. Dolinger. (ring - ring - ring - ring)

Magistrate Dolinger: Hello

M. Bromowich: Hi. Magistrate Dolinger?

Magistrate Dolinger: Yep

M. Bromowich: Mike Bromowich from the U.S. Attorney's office. How are you doing?

Magistrate Dolinger: O.K.

M. Bromowich: Good. A little later than we thought we'd be but here we are. I am here with Special Agent Mike Levine of the Drug Enforcement Administration.

M. Levine: How are you sir?

Magistrate Dolinger: O.K.

M. Levine: We got a recorder going

Magistrate Dolinger: Good

M. Bromowich: And he is going to be the Affiant on this Search Warrant. Do you have your record equipment Magistrate?

Magistrate Dolinger: Unfortunately, I don't have a cassette so I will have to rely on your recorder to work.

Mr. Bromowich: O.K. fine—let's hope it does. Eh—the premises that we are requesting permission to search are 421 Hudson . . .

Magistrate Dolinger: Hm hm

M. Bromowich: . . . Apartment 712 and that's New York, New York. (pause)

M. Bromowich: O.K. Perhaps you should swear in Agent Levine and then He'll proceed to provide you with—with information in support of the warrant over the phone.

Magistrate Dolinger: Very well. Agent, will you please raise your right hand. Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

M. Levine: I do.

Magistrate Dolinger: O.K. You may proceed.

M. Levine: O.K. Eh—should I begin with the overt acts of

M. Bromowich: No

M. Levine: Eh um—let's see—which paper? O.K. I see. Since December, 1983, the New York Drug Enforcement Task Force has been investigating a major narcotics distribution organization based in Manhattan. On January the 27th, 1984, four individuals were arrested and a Complaint was filed in connection with a seizure of approximately 3 kilograms of Cocaine. Approximately 1.5 kilograms of Cocaine was seized at an apartment on East 15th Street in New York. In addition, a substantial quantity of Cocaine, as well as drug records and other narcotics paraphanalia was seized from an apartment located at 661 Washington Street, New York, New York.

Paragraph 2. Subsequently, 13 people have been indicted in connection with these narcotic seizures, including Harold Barr, also known as Larry Freeman; Beverly Grejolais (phonetic) also known as Beverly Grant. Four of these 12 defendants have previously pled guilty in the United States District Court for the Southern District of New York. The other 9 are currently under indictment in a case currently before the Honorable Morris E. Lasker, United States District Judge. Eh—84CR82 is the Indictment number.

Paragraph 3. In addition to the drug records obtained from the Washington Street apartment, the Government recovered, in early September, 1984, voluminous addi-

tional drug records kept by Barr and Grejolais, of dealings with their Cocaine customers. On December 2nd, eh—on December 2nd, 1982, I had been advised that many of these records refer to transactions involving someone named Eli. For example, one entry on December 2nd, under the name Eli, states quote—I gave 2,000 at 67 equals 134,000—enquote. Based on conversations by Detective Rocco SanFilippo, of the New York Drug Enforcement Task Force, with two of Barr's and Grejolais' co-conspirators, as well as an additional evaluation of these records, I believe this entry to reflect the sale of 2 kilograms of Cocaine to Eli at $67 per gram for a total price of $134,000. I believe this entry to refer to December 1981. In the records under Eli, dated January 22, 1982, a second entry reads—quote—I gave 997 times 67 equals 66,800—enquote. I believe this to reflect the distribution of 997 grams of Cocaine at $67 per gram for a total price of $66,800. These records are replete with records of major Cocaine transactions involving Eli.

Number 4. One of the entries in the Washington Street Drug records, dated November 10th, 1983, states quote—Eli $65,000—enquote. I believe this to reflect the amount of money owed by Eli for previous recent Cocaine purchases. Two of Barr's and Grejolais' co-conspirators have confirmed that the other names contained upon the same records are familiar to them as frequent and substantial Cocaine purchasers. Another entry in the Washington Street Drug records states—quote—4 units to Eli at 5 P.M.—unquote. I believe this to refer to the sale of 4 kilograms of Cocaine from Harold Barr and Beverly Grejolais to Eli, sometime between November, 1983, and January 27th, 1984.

Paragraph 5. On January 28th, 1984, at the time Beverly Grejolais, also known as Beverly Grant, was ar-

rested, Detective Rocco SanFilippo of the New York Joint Task Force, seized 3 of her personal telephone books. In two of these books, next to the name quote—Eli—unquote—is the phone number 691-7672. No other individuals named Eli are listed in Grejolais' book.

6. I have been advised that the number 691-7672 is an unpublished number. I've learned from the Security Department at the New York Telephone Company, that 691-7672 is subscribed to by Eliot Cohen who resides at 421 Hudson Street, Apartment 712, New York, New York. I have further been advised by representatives of the Consolidated Edison Company that Eliot Cohen has paid the utility bill at 421 Hudson Street, Apartment 712, since November 1st, 1981.

Number 7. On September 14, 1984, Detective Rocco SanFilippo spoke to representatives of the United States Postal Service responsible for delivering mail to 421 Hudson Street, Apartment 712. He advised me of that conversation. He was told that Eliot Cohen, the defendant, is the only individual who receives mail at that address. The only other mail delivered to that apartment is addressed to Eliot Kid Music Publishing Company.

8. I've been advised, by Detective SanFilippo, that officials responsible for managing the apartment building at 421 Hudson Street, New York, New York, have told him that Eliot Cohen, the defendant, is the only individual who lives in Apartment 712. From analyzing documents shown to be by De—by Detective SanFilippo, which in turn were given to SanFilippo by these officials, I've learned that Eliot Kid Music Publishing Company is a vehicle owned and controlled by Eliot Cohen, the defendant, who is an independent record producer.

9. I have been advised by Detective Rocco SanFilippo who has spoken with officials responsible for managing the apartment building at 421 Hudson Street, that Eliot Cohen frequently receives visitors late at night and early into the morning. Detective SanFilippo has reviewed many of these records and advises me that most of Cohen's visitors stay for extremely short periods of time—anywhere from 20 minutes to an hour and a half.

10. On September 18th, 1984, based on information, an arrest warrant was issued by the Honorable Leonard , United States Magistrate, for the arrest of Eliot Cohen.

11. On October 7th, 1984, Detective Rocco SanFilippo, arrested Cohen at his Hudson Street apartment. At the time of Cohen's arrest, Detective SanFilippo seized a phone book which contained the name—quote—Harold—unquote, which I believe to refer to Harold Barr. Just below the name—just below the entry for Harold are the names—is the name Larry freeman—Quote—and a phone number—quote—Larry Freeman—quote—let's see knock out the last quote. Larry Freeman is the principal alias used by defendant, Harold Barr, since 1981. Also listed in the phone book is—quote—Bob Kalina—unquote. Kalina has formerly represented Barr in a State of Michigan narcotics prosecution. In addition, Kalina represented a second member of Barr's Cocaine organization in recent months.

12. The investigation of Cohen, conducted by Detective SanFilippo and other members of the New York Task Force, has established that he is a major Cocaine trafficker purchasing quantities as large as 4 kilograms at any one time.

13. I've been a Federal Narcotics Agent for more than 14 years. Based on my training, experience and extensive participation in Narcotic Investigations, I know the following:

a. That Cocaine traffickers maintain books, records, receipts, notes, ledgers, airline tickets, money orders and other documents relating to the transportation, ordering, sale, and distribution of controlled substances. Such documents are generally maintained where traffickers have ready access to them. It is common for significant dealers to hide contraband, proceeds of drug sales, records of drug transactions and evidence of financial transactions relating to obtaining, transferring, hiding or spending large sums of money made from controlled substance trafficking activities in secure locations within the residences, businesses and automobiles of themselves, their subordinates, for ready access to conceal them from law enforcement authorities. Traffickers commonly maintain addresses or telephone numbers in books or papers which reflect names, addresses, telephone numbers and/or paging numbers for their associates in the trafficking organization. A dealer of the dimensions of Eliot Cohen would undoubtedly keep records of money owed to his Cocaine suppliers, money owed to him by his own customers and other related narcotics and financial records.

Based on the foregoing, there is probable cause to believe that there will be found on the premises described above, narcotics and financial records, papers, documents and things which constitute evidence of the commission of or the—or are contraband or the fruit of the violation of the Federal Narcotic Law. Including, but not limited to, conspiracy to distribute and to possess with intent to distribute and distribution and possession with intent to

distribute narcotic drug and other controlled substances in violation of Title 21, United States Code, Sections 812, 841a-1, 841b-1 and 846.

Mr. Bromowich: Magistrate, just to clarify what it is that we are seeking authority to search for, it's narcotics and financial records, papers and documents which constitute evidence of the commission of violations of the Federal Narcotics Laws.

Magistrate Dolinger: O.K. Ah-now-if you could just clarify me, I was taking notes as you were speaking.

M. Leving: Yes sir.

Magistrate Dolinger: Am I correct in understanding that the most recent—eh—evidence that you have narcotics transactions by the individual who you have identified as the tenant in the apartment you wish to seize—search—is approximately eleven months ago?

M. Bromowich: That's correct eh your Honor, that's the reason why we're not specifically requesting that we be able to search for narcotics but instead are focusing on records of past narcotics transactions.

M. Bromowich: We don't have anything more current one way or the other. We don't have anything suggesting he's no longer a narcotics trafficker. It has just taken this long to get to Mr. Cohen and—eh—in the meantime we've been arresting other members of the organization.

Magistrate Dolinger: O.K. Although I am somewhat troubled by the time lag involved—eh—it does seem to me that eh—the representations of the eh—Agent are suffi-

cient for probable cause to search the apartment stated which I believe is 421 Hudson Street, Apartment 712 . . .

M. Bromwich: That is correct.

Magistrate Dolinger: . . . to seek the eh—the items specified in the eh—proposed search warrant and according—authorizing the issue of that search warrant.

M. Bromowich: Your Honor we—I guess—or Special Agent Levine should eh—enter your name or actually should sign your name with his initials . . .

Magistrate Dolinger: Right

M. Bromowich: . . . on this duplicate original warrant and then should indicate the time at which it was issued.

Magistrate Dolinger: It is eleven something—I don't have my watch with me.

M. Levine: O.K.—the time I have is eh—11:10 P.M.

Magistrate Dolinger: O.K.

M. Levine: Today's the 7th

M. Bromowich: And the Magistrate's full name, Special Agent Levine, is Michael H. Dolinger spelled D-O-L-I-N-G-E-R

M. Levine: O.K. I've entered the Magistrate's name and initialed it.

M. Bromowich: Special Agent Levine, under there it

has something called Affiants Certification. There you should put "I certify that on this date, which is October 7th, 1984, at 11 approximately 11:10 P.M., and then again you should enter Magistrate Dolinger's Name.

M. Levine: O.K. I am doing that now.

Magistrate Dolinger: And then for the—for the record of the Court—the eh—I get the transcript of this—eh application ultimately should be submitted to the Criminal Court

M. Bromowich: That's correct your Honor. Um—Special Agent Levine then at the bottom then you should put your name—print your name then sign your name

M. Levine: I've done that

M. Bromovich: O.K. And put this time again

M. Levine: O.K. It's done

M. Bromovich: O.K. Magistrate, you have a copy of a warrant as well?

Magistrate Dolinger: Excuse me?

M. Bromowich: You have a warrant as well?

Magistrate Dolinger: I don't have a warrant form

M. Bromowich: O.K.

Magistrate Dolinger: But what you should do is—eh—let me see—is file

M. Bromowich: The duplicate original that we're making out

Magistrate Dolinger: Right—with the eh—the Clerk

M. Bromowich: Right. O.K. I can't think of anything else that we've forgotten, Magistrate, can you?

Magistrate Dolinger: Not at the moment—if I think of anything I'll call you.

M. Bromowich: Hold on just a second, let me check my little rule book (pause)

M. Bromowich: Oh yes your Honor, we are seeking eh—authority to search any time of the day or night

Magistrate Dolinger: Is eh—this individual at liberty presently?

M. Bromowich: No—he's in custody your Honor and, as I think the Affidavit suggested, eh—no other individual was known to have inhabit that apartment.

Magistrate Dolinger: Then what would be the justification for seeking to search . . .

M. Bromowich: We believe he has indicated that he—he very much wants to contact other individuals, apparently not attorneys, and we believe that eh he suspects that a search may be in the offing and he may contat people in order to get them to clear out contraband or other things that are incriminating to him from the apartment.

Magistrate Dolinger: O.K. Then the search is authorized for anytime.

M. Bromowich: O.K. I guess the only other thing is that eh—mainly for the reasons that we've already set forth eh—we do have to satisfy you that there were or are circumstances such that it's reasonable to dispense with submitting a written Affidavit—and for those reasons wo tha's why we proceeded orally at this time.

Magistrate Dolinger: Right

M. Bromowich: O.K. We have made a sufficient showing in your view?

Magistrate Dolinger: Yes

M. Bromowich: O.K. I think that's it.

Mr. Levine: Thank you

M. Bromovich: Thanks very much Magistrate, I appreciate it.

APPENDIX D—DOCKET ENTRY-JUDGMENT OF TRIAL COURT 5/10/85

5-10-85 — FLD GOVT'S SENTENCING MEMORANDUM. (Dkt'd 05/13/85). Sentencing of defendant (Counts S1,S6-S7,S9,S11-S12) (FLD JUDGMENT AND COMMITMENT ORDER . . . DEFT AND ATTY MICHAEL WASHOR PRESENT . . . DEFT IS COMMITTED FOR IMPRISONMENT FOR A PERIOD OF SEVEN AND ONE HALF (7½) YEARS ON COUNTS 1, 6, 7, 9, 11 AND 12. SAID SENTENCES TO RUN CONCURRENTLY AND UPON THE EXPIRATION OF THE SAID CUSTODIAL TERM, ON COUNTS 6, 7, 9, 11 AND 12, TO A SPECIAL PAROLE PERIOD OF TEN (10) YEARS TO RUN CONCURRENTLY PURS TO T.21 USC 841. IN ADDITION, THE DEFT IS FINED ON COUNTS 1, 6, 7, 9, 11 AND 12 THE SUM OF SIXTEEN THOUSAND SIX HUNDRED SIXTY DOLLARS AND SIXTY SIX CENTS ($16,666.66) EACH FOR A TOTAL OF ONE HUNDRED THOUSAND DOLLARS ($100,000.00) TO BE PAID WITHIN 120 DAYS. FINE IS NOT A COMMITTED FINE. COUNTS 13, 16, AND 17 AND INDICTMENT SSS 84 CR 82 (MEL) ARE DISMISSED ON THE MOTION OF THE DEFT'S COUNSEL WITH THE CONSENT OF THE GOVERNEMNT. BAIL CONTINUED PENDING APPEAL. DEFT'S ADDRESS: 421 HUDSON STREET NY, NY 10014 #712. DEFT TO NOTIFY ASST. U.S. ATTY MICHAEL BROMWICH OF ANY CHANGE OF NAME OR ADDRESS.) (JUDGE LASKER) (Dkt'd 05/14/85): Dismissed (Counts 1, 6, 11-13, 15-17, 79, S13, S16-S17) (DISMISSED ON THE MOTION OF THE DEFT'S COUNSEL WITH THE CONSENT OF THE GOV'T.) (JUDGE LASKER) (Dkt'd 05/14/85). Issued Judgment and commitment to U.S. Marshal (Counts S1, S6-S7, S9, S11-S12) (Dkt'd 05/14/85).

05/15/85—THE JUDGMENT ENTERED 5-10-85 SHALL BE DOCKETED AS JUDGMENT #85,0844 (Dkt'd 05/15/85).

05/17/85—Filed notice of appeal (Counts S1, S6-S7, S9, S11-S12) (APPL#2) (FLD DEFT'S NOTICE OF APPEAL TO THE U.S.C.A. 2ND CIRCUIT FROM THE FINAL JUDGMENT ENTERED 5-10-85. COPY OF N/A TO WASHOR, GREENBERG & WASHOR 299 BROADWAY NYC 10007, U.S. ATTY'S OFC ONE ST. ANDREW'S PLZ NYC 10007, COPY OF N/A TO LASKER AND TO USCA WITH DKT ENTRIES ON 5/20/85.) (Dkt'd 05/20/85).

APPENDIX E—DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT 6/30/86

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 433, 668, 651—August Term 1985
(Argued January 13, 1986 Decided June 30, 1986)
Docket Nos. 85-1178, 85-1205, 85-1229

UNITED STATES OF AMERICA,

Appellee,

v.

ELIOT COHEN, a/k/a "ELI", JOHNANNE WINCHESTER, a/k/a "JOHNNIE WINCHESTER," HAROLD BARR, a/k/a "LARRY FREEMAN", a/k/a "BARRY SIMON, a/k/a JAY FOSTER", a/k/a "JAMES ALETTER",

Defendants-Appellants.

Before:

CARDAMONE and PRATT, *Circuit Judges*
and WYZANSKI, *District Judge.**

Appeal by Barr, Winchester and Cohen from judgments of conviction in the United States District Court for the Southern District of New York (Lasker, J.) rendered after a jury trial finding appellants guilty of numerous drug and other offenses. Appeals of Winchester and Cohen raise no meritous issues and hence they are affirmed. Appellant Barr challenges the search of his cell while awaiting trial on Fourth Amendment grounds.

Affirmed in part, reversed and remanded in part.

MICHAEL R. BROMWICH, Assistant U.S. Attorney, Southern District of New York, New York, New York (Kenneth Roth, Assistant U.S. Attorney, New York, New York, of counsel), *for Appellee.*

RICHARD P. CARO, New York, New York, *for Defendant-Appellant Harold Barr.*

LYNNE F. STEWART, New York, New York, *for Defendant-Appellant Johnanne Winchester.*

MICHAEL S. WASHOR, New York, New York (Harvey L. Greenberg, Washor, Greenberg & Washor, New York, New York of counsel), *for Defendant-Appellant Eliot Cohen.*

CARDAMONE, *Circuit Judge:*

Appellants Arthur Barr, Johnanne Winchester and Eliot Cohen challenge the evidentiary and constitutional bases for their convictions in this multi-defendant drug conspiracy case. Except for one issue Barr raises, these challenges are without merit and do not warrant discussion. Therefore, the judgments of conviction of appellants Winchester and Cohen are affirmed.

Barr, the recognized "ring-leader" of the drug conspiracy, was arrested on June 1, 1984 and charged with conspiracy to distribute cocaine, in violation of 21 U.S.C. §846 (1982). When unable to post bail set at one million dollars, he was remanded into custody and held in pre-trial detention at New York's Metropolitan Correctional Center (MCC). Subsequently, four superseding indictments were filed against appellant charging him with distribution of cocaine and interstate travel in aid of drug distribu-

tion activities in violation of 18 U.S.C. §1952 (1982), operating a continuing criminal enterprise, in violation of 21 U.S.C. §848 (1982), tax evasion, in violation of 26 U.S.C. §7201 (1982), obstruction of justice, in violation of 18 U.S.C. §1503 (1982) and witness tampering, in violation of 18 U.S.C. §1512 (1982).

Barr appeals from a judgment of conviction and of forfeiture entered against him on June 19, 1985 in the United States District Court for the Southern District of New York (Lasker, J.) following an eight-week jury trial. He was convicted of operating a continuing criminal narcotics enterprise, narcotics conspiracy (three counts), distribution of narcotics (38 counts), and tax evasion (three counts). The obstruction of justice and witness tampering charges were severed from the other charges during trial. Barr is serving concurrent sentences imposed on these convictions, the longest of which is 20 years. Of the eight issues Barr raises on appeal, seven are without merit. Only the search of his cell in the MCC, while awaiting trial, warrants discussion.

FACTS

On July 5, 1984 MCC corrections officer, Lt. William Chevere, conducted a so-called "contraband" search of Barr's cell. The search lasted approximately half an hour and consisted entirely of an examination of Barr's papers. A short time later, Lt. Chevere returned and examined Barr's papers for an additional hour. Assistant United States Attorney Michael R. Bromwich later admitted in his affidavit that he initiated the July 5 "contraband" search by Lt. Chevere. He directed MCC prison authorities to enter Barr's cell "to look for certain types of

documents that may have contained the names and phone numbers of other of Barr's co-conspirators and witnesses who Barr had already contacted and was still in the process of trying to contact."

In order to establish the requisite probable cause to obtain a search warrant for Barr's cell the next day, Det. Rocco R. Sanfillippo relied primarily on the information found by Lt. Chevere during the July 5 warrantless search of Barr's papers. Based on this information, a magistrate issued a search warrant on July 6 authorizing the seizure of all "written, non-legal materials belonging to Harold Barr." Pursuant to the warrant, Det. Sanfillippo and Lt. Chevere seized numerous sheets of paper from Barr's cell which included witness lists, notes on specific charges, personal mattes, notes on conversations between Barr and his attorneys, and a sheet of paper on which the government contended Barr was practicing to disguise his handwriting.

Upon Barr's motion to suppress this evidence, the district court suppressed some of the material on Sixth Amendment grounds because they related to Barr's right to counsel. But the trial court refused to suppress the remaining papers or to declare the search unlawful on Fourth Amendment grounds.

DISCUSSION

On appeal Barr challenges the July 5th search of his prison cell as a warrantless search conducted in violation of the Fourth Amendment. If he succeeds on this claim the evidence seized on July 6th will be suppressed since the information establishing probable cause for that search was the fruit of an

unlawful search. *Wong Sun v. United States,* 371 U.S. 471 (1963). Barr further argues that the district court should have conducted a taint hearing to determine what fruits, if any, were obtained as a result of information derived from the warrantless search. The government relies on *Hudson v. Palmer,* 104 S.Ct. 3194 (1984), for the proposition that the Fourth Amendment provides no protection for a prisoner's claim of a privacy right in his prison cell. It argues that the fruits of any search conducted of the cell of either a convicted prisoner or pre-trial detainee may not be suppressed on constitutional grounds.

A. *Prior Case Law Leading to* Hudson v. Palmer

To resolve this issue, it is helpful to review several Supreme Court decisions that preceded *Hudson. Price v. Johnston,* 334 U.S. 266, 285 (1948), set forth the general principle that lawful imprisonment necessarily entails a restriction or withdrawal of constitutional rights, "a retraction justified by the considerations underlying our penal system." Prison officials need wide latitude to subject prisoners to appropriate rules and regulations. *Cruz v. Beto,* 405 U.S. 319, 321 (1972) (per curiam). Institutional security and related administrative problems as well as legitimate objectives of the correctional system require limitations on prisoner rights. *Pell v. Procunier,* 417 U.S. 817, 826 (1974).

While those provisions of the Constitution that are applicable in general to all citizens must be accomodated to institutional needs and objectives, no wall separates the constitution from prison inmates. *Wolff v. McDonnell,* 418 U.S. 539, 555-56 (1974). Thus, prisoners have been held to retain right of access to the courts, see *Johnson v. Avery,* 393 U.S. 483, 485 (1969); *Ex parte Hull,* 312 U.S.

546, 548-49 (1941); Equal Protection Clause of the Fourteenth Amendment protects them against invidious discrimination on the basis of race, except as may be essential tc prison security, see *Cruz v. Beto,* 405 U.S. at 321; *Lee v. Washington,* 390 U.S. 333, 334 (1968) (per curiam); and the Eighth Amendment safeguards inmates from "deliberate indifference to [their] serious medical needs. . . ." *Estelle v. Gamble,* 429 U.S. 97, 104 (1976).

From these cases there emerges a rule that when a prison restriction infringes upon a specific constitutional guarantee, it should be evaluated in light of institutional security. Security is the main objective of prison administration; prison officials must have broad latitude to adopt rules that protect the safety of inmates and corrections personnel and prevent escape or unlawful entry. *Bell v. Wolfish,* 441 U.S. 520, 547 (1979). "This principle applies equally to pretrial detainees and convicted prisoners. A detainee simply does not possess the full range of freedoms of an unincarcerated individual." *Id.* at 546.

This brings us to the Supreme Court's 1984 decision in *Hudson v. Palmer.* In that case a convicted inmate filed an action against a prison official under 42 U.S.C. §1983 (1982) claiming that an unreasonable "shake down" search of his prison locker and cell violated his Fourth Amendment rights. The Court restated the now self-evident truth that prisoners retain rights as prisoners that are not "fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." 104 S.Ct. at 3198. Yet, because the interest of society in the security of its penal institutions outweighs the interest of the prisoner in privacy within his cell, it held that the traditional Fourth Amendment privacy right is "fundamentally incompatible with the close and continual surveillance of inmates and their cells

required to ensure institutional security and internal order." *Id.* at 3200-01. Such a conclusion is bottomed on common sense because if drugs, weapons, and contraband are to be ferreted out of jail cells, then prison officials must have unrestricted access to those places to accomplish that objective. Concededly, isolated instances of unreasonable searches by prison officials may occur, but overall considerations of institutional security outweigh a prisoner's claim to privacy in particular cases. "We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount inteest in institutional security." *Id.* at 3201.

Prior to *Hudson,* decisions upholding cell searches had done so only in cases where prison officials had grounded the reason for the search on security. *See Lyon v. Farrier,* 727 F.2d 766, 769 (8th Cir.) (*per curiam*), *cert. denied,* 105 S.Ct. 140 (1984); *Olson v. Klecker,* 642 F.2d 1115, 1117 (8th Cir. 1981); *United States v. Lilly,* 576 F.2d 1240 (5th Cir. 1978), *reh'g denied,* 599 F.2d 619 (5th Cir. 1979) (per curiam); *United States v. Ready,* 574 F.2d 1009, 1014 (10th Cir. 1978) ("Certainly in a federal prison the authorities must be able to search the prisoners' cells without a warrant, without notice and at any time, for concealed weapons and contraband of the type which type which threatens the security or legitimate purposes of the institution."); *Bonner v. Coughlin,* 517 F.2d 1311, 1316-17 (7th Cir. 1975). In determining whether pre-trial detainees had superior rights to convicted prisoners, the Supreme Court stated in *Bell v. Wolfish,* 441 U.S. at 546, that the *fact* of confinement and the legitimate objectives of the penal institution curtail the constitutional rights of any prisoner, whether convicted or not. Although pre-trial detainees have not been adjudicated guilty of the crimes for which they have been charged, the Court believed that

in terms of prison security there was no basis to conclude that pre-trial detainees pose a lesser risk to security than convicted inmates. *Id.* at 546 n.28.

We are left then with deciding whether the consistent holdings of the Supreme Court in the several decisions recited mean that a pre-trial detainee retains no Fourth Amendment rights, regardless of the circumstances underlying the search. This is the view the government urges. We refuse to adopt it in this case for the following reasons.

B. *Application of Law to Present Facts*

In this case, the record clearly reveals that the July 5th search of Barr's cell was initiated by the prosecution, not prison officials. The decision to search for contraband was not made by those officials in the best position to evaluate the security needs of the institution, nor was the search even colorably motivated by institutional security concerns. The Supreme Court in *Hudson* did not contemplate a cell search intended solely to bolster the prosecution's case against a pre-trial detainee awaiting his day in court; it did not have before it the issue of whether such a search could lawfully be used by government prosecutors to uncover information that would aid them in laying additional indictments against a detainee. We read *Hudson* to hold that *prison officials* are presumed to do their best to evaluate and monitor objectively the security needs of the institution and the inmates in their custody, and then to determine whether and when such concerns necessitate a search of a prison cell.

The door on prisoner's rights against unreasonable searches has not been slammed shut and locked. We take seriously the Court's statement that no iron curtain

separates prisoners from the Constitution, and that the loss of such rights is occasioned only by the *legitimate* needs of institutional security. The emphasis on the need to accommodate individual rights to what is recognized as legitimate penological objectives is the dominant theme throughout the Supreme Court's writing on this subject. From this it is patent that since no wall of steel and stone separates prisoners from the Constitution, prisoners' rights continue to exist. It is the scope of these rights that is necessarily limited by the broad authority prison officials must have to ensure institutional security; obviously the creation of a limitation or condition on the exercise of constitutional rights is essential to orderly prison administration. Yet, because conditioning the exercise of such rights rests on the twin-rationale of *objective* administrators insuring prison *security,* a limitation imposed on prisoners' constitutional rights cannot stand when the objectives the rationale serves are absent. Nor may federal courts charged with the duty to protect the rights of all citizens fulfill that objection merely by paying lip-service to this concept.

In this case it is plain that no institutional need is being served. Were it a prison official that initiated the search of Barr's cell, established decisional law holds that the search would not be subject to constitutional challenge, regardless of whether security needs could justify it. But here the search was initiated by the prosecution solely to obtain information for a superseding indictment. In our view, this kind of warrantless search of a prisone's cell falls well outside the rationale of the decided cases. Barr retains a Fourth Amendment right—though much diminished in scope—tangible enough to mount the attack on this warrantless search.

We hold therefore that Barr retains an expectation of privacy within his cell sufficient to challenge the investigatory search ordered by the prosecutor. Because his effects were searched at the instigation of non-prison officials for non-institutional security related reasons, the validity of the search may be challenged. An individual's mere presence in a prison cell does not totally strip away every garment cloaking his Fourth Amendment rights, even though the covering that remains is but a small remnant.

Thus, the district court's refusal to suppress all of the evidence obtained in Barr's cell search is reversed. Nevertheless, we remand the case to that court for it to decide whether—in light of the overwhelming evidence of Barr's guilt—the failure to suppress this material was harmless error. The trial court should hold a taint hearing to consider what fruits, if any, were obtained from information seized in the warrantless search of July 5th. We are cognizant of the fact that the evidence seized related primarily to the witness tampering and obstruction of justice charges, neither of which convictions are before us on appeal. The remand will permit the district court to decide what prejudice, if any, Barr suffered from the admission of this evidence.

Affirmed in part, reversed and remanded in part.